IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 21, 2007 Session

STATE OF TENNESSEE v. JASON ANDREW SINGLETON

Direct Appeal from the Criminal Court for Hawkins County
No. 05-CR-133 James E. Beckner, Judge

No. E2006-01809-CCA-R3-CD - Filed January 24, 2008

Following a jury trial, Defendant, Jason Andrew Singleton, was convicted of one count of simple possession of methamphetamine and one count of unlawful possession of drug paraphernalia. Defendant was sentenced to eleven months, twenty-nine days on each count to be served concurrently. The jury fixed the maximum fine of $2,500.00 in each case. Defendant on appeal argues (1) the evidence was insufficient to convict him of simple possession; (2) the trial court erred in denying Defendant the right to waive jury imposition of fines and the fines imposed by the jury were excessive and should be imposed "concurrently;" and (3) the imposition of the eleven month, twenty-nine day sentences was excessive and the presentence report was completed in violation of Defendant's Sixth Amendment right to counsel. After a thorough review of the record, we affirm the convictions and the length of sentences, but reverse and remand the sentences for a sentencing hearing to determine the percentage of the sentence to be served in confinement prior to Defendant being released on probation, and for a non-jury determination of the fines, if any, to be imposed.

Tenn. R. App. P. 3, Appeal as of Right;
Judgment of the Criminal Court Affirmed in Part; Reversed and Remanded in Part

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Paul Whetstone, Morristown, Tennessee, for the Appellant, Jason Andrew Singleton

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; C. Berkley Bell, District Attorney General; Douglas Godbee, Assistant District Attorney General; and Virgil Everhart, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Defendant's convictions arise out of an incident that occurred on April 6, 2005. Officers executing a search warrant at the home of Defendant, Jason Singleton, found two glass pipes, 7.4

grams of methamphetamine, various chemicals known to be used in the manufacture of methamphetamine, and 25 milliliters of methamphetamine. There were two men present at the house, Defendant and Ronald Brewer. Mr. Brewer pled guilty in General Sessions court to simple possession of methamphetamine. The grand jury indicted Defendant on four counts: count one, possession with the intent to deliver a controlled substance to wit methamphetamine; count two, initiating a process to manufacture methamphetamine; count three, promoting methamphetamine manufacture; and count four, unlawful possession of drug paraphernalia. A jury convicted Defendant of the lesser included offense of simple possession of a controlled substance to wit methamphetamine as to count one and also convicted him of unlawful possession of drug paraphernalia as charged in count four. The jury found Defendant not guilty of counts two and three.

I. Background

Sergeant Tony Allen of the Hawkins County Sheriff's Department testified for the State that he knocked on the door of Defendant's residence in order to execute the search warrant. Sergeant Allen secured Defendant and searched him. In the pocket of Defendant's pants, Sergeant Allen found a glass pipe. He turned the pipe over to Detective DePew in order to be catalogued as evidence. Tammy Lucas testified that she took the evidence obtained by Detective DePew to the Tennessee Bureau of Investigation (T.B.I.) crime lab in Knoxville.

Detective Brad DePew of the Hawkins County Sheriff's Department also testified for the State. Detective DePew found another glass pipe in the living room and discovered a Sucrets box in Defendant's living room that contained three baggies that he believed to contain methamphetamine. Detective DePew weighed the box and the baggies upon returning to the sheriff's office and found the total weight to be 13 grams. Detective DePew sent the larger two bags of the substance to be tested at the T.B.I. crime lab. On cross-examination, Detective DePew testified that he did not mix the substances obtained at Defendant's residence with substances from any other cases he was investigating at the time. He stated that the procedure he follows is to get a "plastic baggie" from the office, "write on the baggie my name, the case number, label it, seal it up, and then put it in another envelope, and seal it up. I fill out a lab request for the item that I want examined, what kind of examination I want. It's then turned over to our evidence technician [Tammy Lucas] where, in turn, it is took [sic] to the Tennessee Bureau of Investigation crime laboratory." Detective DePew further testified that the glass pipe found on Defendant is one which is commonly used to smoke methamphetamine and crack cocaine.

T.B.I forensic scientist, Clayton Hall, testified for the state. Mr. Hall was stipulated by the parties as an expert in the field of forensics and chemistry. Mr. Hall testified that the substance in the baggies was methamphetamine and the amount was 7.4 grams. Detective DePew had already explained that this weight was different from Detective DePew's observation because T.B.I. personnel only weighed the substance itself, while Detective DePew weighed the baggies also.

Ronald Brewer testified for the defense. Mr. Brewer arrived at Defendant's home about twenty or thirty minutes before the police arrived. He brought methamphetamine with him to

Defendant's home. Mr. Brewer and Defendant were planning on smoking the methamphetamine. He also stated that both pipes belonged to him (Mr. Brewer). However, he admitted to handing one of the pipes to Defendant. When the sheriff's department knocked on the door, Mr. Brewer saw Defendant place the pipe in his pant pocket. On cross-examination, Mr. Brewer stated that Defendant tied one of the baggies of methamphetamine back together, but that neither of them were able to smoke it because the deputies arrived.

Defendant also testified in his own behalf. He testified that the drugs were not his, although he was planning on smoking the methamphetamine with Mr. Brewer. He also admitted to placing the glass pipe in his pocket. He did not admit to tying one of the baggies.

II. Analysis

A. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence regarding his conviction for simple possession of methamphetamine, but Defendant does not challenge the sufficiency of the evidence to support his conviction for possession of drug paraphernalia. In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). A jury verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994). On appeal, the state is entitled to the strongest legitimate view of the evidence and all legitimate or reasonable inferences which may be drawn therefrom. *Id*. This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the defendant demonstrates that the facts contained in the record and the inferences which may be drawn therefrom are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. *State v. Brewer*, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). Accordingly, it is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979); *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994). Furthermore, great weight is given to the jury verdict in a criminal trial; it accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Bigbee*, 885 S.W.2d 797, 803 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992).

Tennessee Code Annotated section 39-17-418(a) (2006) provides, "It is an offense for a person to knowingly possess or casually exchange a controlled substance . . ." Our Supreme Court has held, "the statute prohibiting "possession" of a controlled substance is not restricted to proof of actual possession, and evidence of either constructive possession or other control over the substance is sufficient to establish this element." *State v. Ross*, 49 S.W.3d 833 (Tenn. 2001). In order for a person to be found in constructive possession of a drug, it must appear that the person has the power and intention at any given time to exercise dominion and control over the drugs. *State v. Bigsby*, 40 S.W.3d 87, 90 (Tenn. Crim. App. 2000) (quoting *State v. Williams*, 623 S.W.2d 121, 123 (Tenn.

Crim. App. 1981)). Furthermore, while mere presence at a place where controlled substances are found does not support an inference of possession, a person in possession of the premises where controlled substances are found may be presumed to also possess the controlled substances found. *State v. Transou*, 928 S.W.2d 949, 955-56 (Tenn. Crim. App. 1996); *See Armstrong v. State*, 548 S.W.2d 334 (Tenn. Crim. App. 1976). There is no dispute that Defendant owned the premises where the drugs were found. Also, Defendant testified at trial that he and Mr. Brewer were intending to smoke the methamphetamine but were interrupted by the police. These facts support the finding by the jury of simple possession.

In the instant case, Defendant argues that the evidence is insufficient because Detective DePew only transferred two of the three bags of the substance to the T.B.I. laboratory for analysis and Mr. Brewer was an accomplice and his testimony that Defendant tied one of the baggies of methamphetamine does not support the conviction because the State did not prove that particular bag was one of the two sent to the T.B.I. laboratory. The fact that Defendant tied only one of the three bags and only two were sent to the laboratory for analysis does not result in the conclusion that he only "possessed" that bag. It is circumstantial evidence that he constructively possessed all three baggies. Defendant's possession of a pipe used to smoke methamphetamine in his pant pocket and Defendant's testimony that he intended to smoke the methamphetamine at the time the police arrived are also circumstantial evidence of his constructive possession of methamphetamine.

After a thorough review of the record and in accordance with the standard of review set out above, we conclude that the evidence was sufficient to find Defendant guilty beyond a reasonable doubt of simple possession of methamphetamine. Accordingly, Defendant is not entitled to relief as to this issue.

B. Jury Imposition of Fines

The Tennessee Constitution requires that any fine exceeding $50.00 must be set by a jury. Tenn. Const. art. VI, § 14. A fine may be imposed either alone or in addition to another sentence. T.C.A. § 40-35-104 (c)(1). In *State v. Bryant*, 805 S.W.2d 762 (Tenn. 1991) our Supreme Court held, "sentence is a broad term which includes fine, probation, or confinement . . ." *Bryant*, 805 S.W.2d at 765. Our Supreme Court further stated that appellate review of fines is well within the spirit and purpose of the Criminal Sentencing Reform Act. *Id*. at 766. Appellate review of fines is also in accordance with the Tennessee Constitution. Article VI, section 14 exists as a protection for defendants, in order to ensure they are not sentenced to an excessive fine. *Id*. at 767. Our standard of reviewing the imposition and amount of a fine is the same as a sentence of confinement. This Court will conduct a *de novo* review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401.

Defendant argues two separate, yet related, claims as to the jury imposition of the fines. Defendant first argues that the trial judge erred in denying his motion to waive jury imposition of fines. Our Supreme Court in *State v. Durso*, 645 S.W.2d 753 (Tenn. 1983) settled what had been

a long debated issue regarding Article VI, section 14. The Court held that a defendant has the right to waive rights existing for the defendant's protection and benefit so long as it is done in accordance with the rules of criminal procedure. *Durso*, 645 S.W.2d at 759. The Court further held, "such waiver should be given effect." *Id*. In the instant case, Defendant properly filed a motion for waiver of the jury imposition of fines and the trial court denied the motion. This was error. It was within the rights of Defendant to waive a right that is for his benefit and such a waiver should be given effect. *Id*. Because the jury fixed the fines at the maximum amount in each case, we are unable to conclude that it was harmless error for the court to deny Defendant's motion. Accordingly, we must reverse the judgments to the extent fines are imposed, and remand to this case for a determination by the trial court of the amount of fines, if any, to be imposed. In the event of further review, we will address Defendant's remaining issue concerning the fines.

Defendant argues that the fines are excessive. Defendant further requests that if we find them not to be excessive, then fines should be imposed "concurrently." The jury sentenced Defendant to pay the maximum of $2,500 for each count on which they found guilt, for a total of $5,000. Defendant contends that due to his indigent status these fines should be reduced or run concurrently.

In the sentencing order, the trial judge made no findings of facts as to Defendant's ability to pay the fines fixed by the jury. Because of this, our review is *de novo* without a presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). Defendant filed an affidavit of indigency in this case. He stated that he earns $320.00 per week and owns $8,750.00 worth of property. His assets include his mobile home, a car, and a truck. Defendant also has an eight year old son. The trial court found Defendant to be partially indigent and ordered him to pay $100.00 per month until he paid $500.00 towards his attorney fees. There is no evidence in the record as to whether Defendant has been able to make these payments. This Court has held, "A declaration of indigency, standing alone, does not immunize the defendant from fines." *State v. Alvarado*, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Indigency is just one factor that this Court will look to when reviewing the imposition of a fine. *Alvarado* 961 S.W.2d at 153. We do not contest that Defendant in the instant case is partially indigent; however, that fact alone is not reason enough to reduce or waive the fines. Defendant has two prior convictions, one in Indiana and one in the Hawkins County General Sessions Court. The Indiana conviction was for possession of marijuana and the General Sessions conviction was for simple possession and possession of drug paraphernalia. Defendant was on probation for each of these convictions when the offense in the case *sub judice* occurred. Therefore, after reviewing the indigency of Defendant in addition to the circumstances surrounding his convictions, and based upon the record before us, we conclude that the trial judge did not err, except as previously noted, in requiring Defendant to pay the entire fine.

Because we do not find the $2,500 fine to be excessive as to either count, Defendant next asks this Court to impose the fines "concurrently." Defendant argues that, because the trial court imposed his jail sentences concurrently, the fines, as part of the sentence as a whole, should also be concurrent. This Court dealt with this concept in *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). In *Woodcock*, the defendant was charged with three counts of incest and two counts of rape. *Woodcock* 922 S.W.2d at 907. The jury found him guilty of all counts and

recommended fines in the amount of $25,000 for one count of rape and $10,000 each for two counts of incest. *Id*. At the sentencing hearing, the trial court sentenced the defendant to eight years for one count of rape and four years for one count of incest, to be served concurrently. The trial judge also sentenced the defendant to ten years on the other rape count and five years on each of the other two counts of incest to be served concurrently with each other, but consecutively to the eight year effective sentence for the other rape and incest convictions, for a total effective sentence of eighteen years. *Id*. The trial judge also imposed the fines recommended by the jury, totaling $45,000. The defendant argued that the fines are "necessarily a part of his concurrent sentences and therefore should only total $25,000." *Bryant*, 805 S.W.2d at 917. This Court held:

> [T]he trial court's imposition of concurrent 'sentences' under T.C.A. § 40-35-115 refers only to the defendant's terms of imprisonment and does not imply that fines are to be paid concurrently, or non-cumulatively. . . [U]nder our interpretation of the language of T.C.A. § 40-35-115, any reference to concurrent *sentences* alone does not include concurrent fines by implication.

Id. The trial judge in Defendant's case made no indication on the record that he desired the fines to be paid concurrently. We continue to abide by our holding in *Woodcock*. Defendant is not entitled to relief as to this issue.

C. Length of Sentences

Defendant argues that the trial judge committed reversible error in requiring Defendant to fill out a pre-sentence report prior to determination of his guilt or innocence by the jury. Defendant claims this was a violation of his right to be free from self-incrimination. In filling out a "Personal Questionnaire and Statement" form from probation services, Defendant stated that he had not used illegal drugs; however, Defendant then went on to document two prior convictions for drug possession. During the sentencing hearing, Defendant admitted to using illegal drugs in the past. He explained that he lied on the form because he, "was afraid it would hurt my case." The pre-sentence report was submitted on October 11, 2005. Defendant stood trial for these charges on June 8, 2006. Clearly, the pre-sentence report was completed prior to adjudication of guilt by the jury. Tennessee Code Annotated section 40-35-205(b) provides:

> With the concurrence of a defendant, a court may direct the presentence service officer to begin the presentence investigation before the adjudication of the guilt of the defendant. Nothing discovered by the presentence investigation may be disclosed to the district attorney general, the court, or the jury before acceptance of a plea of guilty or a verdict of finding of guilty unless the defendant concurs. If the presentence investigation is begun before the adjudication of guilt, the information discovered shall be disclosed to the defendant or defendant's counsel, upon request, after the court's acceptance of a plea of guilty or a verdict or finding of guilt.

The record is silent as to whether or not defendant consented to the instigation of the report prior to trial. The State contends that his concurrence is inferred by his completion of the questionnaire. We decline to accept this contention. The top of the questionnaire filled out by Defendant does not inform Defendant that he has the right to refuse to complete the report. It does not say that the information will remain confidential unless or until Defendant is found guilty. It seems a fair inference can be made from Defendant's statement that he "was afraid it would hurt my case" that he was not informed of the provisions of section 40-35-205(b).

The Supreme Court of the United States has long held that "the [Sixth Amendment] right to counsel attaches only at or after the initiation of adversary proceedings against the defendant . . . '[W]hether by way of formal charge, preliminary hearing, indictment or arraignment.'"

United States v. Gouveia, 467 U.S. 180, 187-88, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 688-89, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). In the instant case, Defendant's arraignment occurred on June 6, 2005. The presentence report was submitted on October 11, 2005. Defendant was not tried until June 8, 2006. Defendant's counsel was not present when Defendant filled out the questionnaire for the probation department despite the fact that his Sixth Amendment right to counsel had already attached.

Furthermore, probation services is undoubtedly an agent of the state. The questionnaire Defendant filled out states that the form will be used "to assist the court in determining your sentence and probationary status." The form has the seal of the State of Tennessee in one corner and the seal of the Tennessee Board of Probation and Parole in the other. Although it is conceded in the instant case, that the instigation of the report was not to obtain information to be used against Defendant at trial, it still violated Defendant's Sixth Amendment right to counsel. In Tennessee, an arrest warrant, or a preliminary hearing if no arrest warrant is issued, or an indictment or presentment, when the charge is initiated by the grand jury, marks the initiation of criminal charges to which the Sixth Amendment right to counsel attaches. *State v. Mitchell*, 593 S.W.2d 280, 286 (Tenn.1980). Article I, section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself." Tenn. Const. art. I, § 9. Defendant's counsel was not present when the questionnaire was filled out. The questionnaire was from probation services, a State agency, and Defendant had been arraigned. Therefore, he had a Sixth Amendment right to be represented by counsel.

The applicable statute allows the instigation of the pre-sentence report prior to trial with the concurrence of the defendant. However, constitutional restraints require the "concurrence of the defendant" to be knowingly and voluntarily made in the presence of, or at least with the written consent of, counsel. The most logical way to accomplish this would be to obtain the waiver during arraignment or at a later court proceeding on the record, after counsel had been appointed or retained.

Given the trial judge's reasons in the sentencing order for sentencing Defendant in the manner he did, any error did not affect Defendant's sentence. Defendant argues that the trial judge used his false statement on the questionnaire as a reason to sentence Defendant to the maximum of

eleven months, twenty nine days. The sentencing order does list the false statement as the last of four reasons as to why the trial judge refused to grant probation. The other reasons were (1) defendant's prior record (2) his history of probation violations and (3) the fact that he was on probation at the time of the instant offenses. These three reasons are reasonable factors on their own to deny probation prior to the seventy-five percent release eligibility date.

Defendant further contends that his eleven month, twenty-nine day sentence is excessive even if his answers to the pre-sentence report were properly considered. When imposing a sentence for a misdemeanor, the trial court must allow the parties a reasonable opportunity to be heard regarding the length of the sentence and manner in which it is to be served. T.C.A. § 40-35-302(a). The trial court must specify the length of the sentence in months, days, or hours. T.C.A. § 40-35-302(b). It should also specify a percentage of not greater than seventy-five percent which must be served by the defendant before eligibility for "work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d). In the instant case, the judge conducted a separate sentencing hearing allowing Defendant to testify and to call witnesses in his own behalf. The trial judge then sentenced Defendant to eleven months, twenty-nine days for each conviction and ordered them to be served concurrently. He also specified that Defendant would not be eligible for probation until he had served seventy-five percent of his sentence. However, when the trial judge filed the judgment in the instant case, it reflected service at 75 percent and then Defendant would be eligible for work release, furlough, trusty status, and rehabilitative programs. Accordingly, the sentences are reversed and the case is remanded for sentencing to be reconsidered. Upon remand the trial court must clarify whether Defendant is to be released on probation upon serving a percentage of his sentence.

Unlike the felon, a defendant convicted of a misdemeanor enjoys no presumption of a minimum sentence. *State v. Humphreys*, 70 S.W.3d 752, 768 (Tenn. Crim. App. 2001). Still, the trial court should consider enhancement and mitigating factors, the purposes of the Criminal Sentencing Reform Act of 1989, and general sentencing principles in imposing the sentence and should not set the percentage arbitrarily. T.C.A. § 40-35-302(d). Although it would be a better practice for the trial court to make findings on the record when setting the percentage, there is no requirement that the trial court do so. *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). When a defendant challenges the sentence, this court conducts a *de novo* review with a presumption the trial court's determinations are correct. T.C.A. § 40-35-401(d).

The trial court not only conducted a sentencing hearing, but also entered a sentencing order that is available to us on appeal. The trial judge delineates clearly his reasons for imposing the sentence. The court found applicable the following enhancement factors of section 40-35-114 as a guide for imposing Defendant's sentence:

1. Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

2. The defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release in the community.

Defendant has a conviction for simple possession of marijuana from Henry County, Indiana and a conviction for possession of drugs and drug paraphernalia in the General Sessions Court of Hawkins County. Defendant also admitted while testifying that he still uses methamphetamine in the amount of "about one gram per week." Defendant was also on probation at the time the instant incidents occurred. Further, the court considered, but found no mitigating factors.

The trial judge then addressed the purpose of the Criminal Sentencing Reform Act outlined in section 40-35-102. The judge stated that all purposes had been considered but he focused on three. They are:

1. Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense;

2. To assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions;

3. To prevent crimes and promote respect for the law by providing an effective determent to those likely to violate the criminal laws of this state.

The trial judge then considered all of the sentencing considerations and pointed to five to support the sentence imposed:

1. Confinement is necessary to avoid depreciating the seriousness of the offense and confinement is particularly suited to promote an effective deterrence to others likely to commit similar offenses;

2. Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;

3. The sentence imposed should be no greater than that deserved for the offense committed;

4. Inequalities in sentences should be avoided; and

5. The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed.

After reviewing the record, we conclude that the sentences of eleven months, twenty-nine days to be served concurrently sentence is not excessive and are in accordance with the purposes set out in the Sentencing Reform Act. Accordingly, Defendant is not entitled to relief as to this issue.

CONCLUSION

After a thorough review of the record we affirm the judgments of the convictions and the length of sentences. We reverse the sentences and remand to the trial court for a new sentencing hearing to determine the percentage to be served prior to Defendant being released on probation, and for a non-jury determination of the fines, if any, to be imposed.

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THOMAS T. WOODALL, JUDGE